



**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified to a 41 percent loss of use of the lower extremity.

**Findings of Fact**

1. Claimant injured his right knee May 19, 1995, when he stepped off a school bus while unloading supplies for a track meet. Claimant heard a pop, he had difficulty walking, and his knee immediately became swollen.
2. Prior to the May 19, 1995 injury, claimant had undergone three surgeries to the right knee, one in 1963 and two in the 1980s. Between the last surgery in 1989 and the current injury in 1995, claimant remained active without significant difficulty, officiating basketball, coaching track, teaching weight lifting, and riding horses.
3. Claimant did not seek medical attention for two months after his injury of May 19, 1995. Claimant did see Dr. Gary L. Harbin on June 9, 1995, for a different orthopedic problem, an elbow injury. On that visit, claimant did not mention his knee. On July 19, 1995, claimant went to Dr. Harbin again, this time with complaints of knee problems. Dr. Harbin had treated claimant for a knee injury in 1989.
4. In 1989, Dr. Harbin treated claimant for complaints of knee pain after extensive basketball officiating. At that time, claimant had bilateral swelling, more on the left, and medial side tenderness, again more on the left than the right. Claimant had undergone a meniscectomy on the right before Dr. Harbin saw claimant in 1989.<sup>1</sup> Dr. Harbin did arthroscopic surgery on the right in 1989 because of additional complaints after pinch hitting over the weekend. Dr. Harbin testified that from the arthroscopic surgery he found claimant had bone-on-bone contact in 1989. The cartilage had worn away. On August 29, 1995, after the current injury, Dr. Harbin did arthroscopic surgery and removed a spur on the tibial spine.
5. Claimant continued to have problems with his knee after the surgery by Dr. Harbin. Claimant returned to work for respondent in the fall of 1995.
6. Claimant saw Dr. Gregory A. Woods, an orthopedic physician, in February 1996. Dr. Woods discussed the possibility of a total knee replacement but claimant indicated he wanted to continue without the surgery. Claimant indicated he might consider knee replacement in the future. In March 1996, claimant saw Dr. Woods again. Knee replacement was discussed again and claimant was given injections. Finally, in May 1996,

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<sup>1</sup> Dr. Harbin testified on page 6 of his deposition that when he saw claimant in 1989 there had been surgery on the left. But the medical records from 1963 mention only a meniscectomy on the right.

claimant agreed to the knee replacement and the surgery was done in June 1996. Dr. Woods testified that the work-related injury contributed to the need for total knee replacement. He did not know how much the preexisting impairment was. He rated the impairment as 50 percent of the lower extremity. Dr. Woods' rating was based on the Fourth Edition of the *AMA Guides to the Evaluation of Permanent Impairment*.

7. Dr. Harbin also testified about why claimant needed a knee replacement. When asked whether the total knee replacement was causally related to the preexisting degenerative condition of the knee, Dr. Harbin testified that the "need for a total knee replacement was there irregardless of what happened, but the injury could have accelerated that anyway." Dr. Harbin also testified that the chronology was consistent with the conclusion that the injury accelerated the need for knee replacement. He testified that after a twisting incident it can be weeks and weeks before the symptoms come on. While he felt an injury could have accelerated the need for knee replacement, he could not say.

8. Dr. Kenneth A. Jansson examined claimant at the request of the Administrative Law Judge. Dr. Jansson's reports and testimony are somewhat ambiguous. First, he testified that the injury in May 1995 did not aggravate or accelerate claimant's condition. But he also testified that 95 percent of the knee impairment was due to preexisting problems and 5 percent due to the injury at work. He testified that if claimant was having symptoms before the 1995 injury he would have no difficulty saying there was no aggravation from the accident in May 1995.

Dr. Jansson rated claimant's impairment as 10 percent of the lower extremity and testified that 9.5 percent of this preexisted the injury. Dr. Jansson described his rating as one based on the pain claimant continued to experience. He stated he might otherwise, after the knee replacement, have considered a 0 percent rating to be appropriate. Dr. Jansson testifies his rating was based on the Fourth, Fifth, or whatever version of the *AMA Guides* is applicable. He also repeatedly emphasized the *Guides* are only guides and stated they could give anywhere from 0 to 100 percent impairment. In our view, considering the testimony from the other physicians about how the *Guides* apply to this case, Dr. Jansson's rating is not consistent with the *AMA Guides*.

9. At the request of his counsel, claimant was also examined by Dr. Daniel D. Zimmerman. Dr. Zimmerman rated the impairment as 41 percent of the lower extremity. Dr. Zimmerman's rating was based on the Third Edition, Revised, of the *AMA Guides to the Evaluation of Permanent Impairment*. He agreed that claimant would have had impairment before the 1995 injury but he could not say how much. He also opined that the 1995 injury permanently aggravated the preexisting degenerative changes in claimant's right knee.

10. The Board finds claimant's injury of May 19, 1995, did cause permanent impairment to claimant's knee and did accelerate the need for knee replacement. This conclusion is based on claimant's testimony as well as the testimony of Dr. Woods and Dr. Zimmerman.

### Conclusions of Law

1. Claimant's knee injury was compensable under the Kansas Workers Compensation Act. The Act provides benefits for injury which aggravates or accelerates a preexisting condition. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987).
2. The Board finds claimant has a 41 percent impairment to the right lower extremity. This conclusion rests on the testimony of Dr. Zimmerman, the only physician to provide a rating based on the Third Edition, Revised, of the *AMA Guides to the Evaluation of Permanent Impairment*. Dr. Woods based his on the Fourth Edition. Dr. Jansson testified he based his rating on the Fourth, Fifth, or whatever edition applied, but the Board finds his rating was not consistent with the *AMA Guides*. K.S.A. 1994 Supp. 44-510e requires that the functional impairment be based on the Third Edition, Revised, of the *AMA Guides to the Evaluation of Permanent Impairment*.
3. K.S.A. 1994 Supp. 44-510e provides for reduction of a claimant's disability by the amount of any preexisting impairment. But in this case, the Board finds the evidence does not provide a reasonable basis for determining the amount of the preexisting impairment. Only Dr. Jansson testifies to a percentage of preexisting impairment but he is rating the pain and is not providing a rating under the *AMA Guides*. His conclusion does not, therefore, provide a logical basis for assigning impairment to the preexisting condition. The other physicians who testified indicated they could not determine the extent of preexisting impairment. The Board would be required to speculate as to the extent of preexisting impairment and, therefore, will not reduce the award for preexisting impairment.

### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore on July 30, 1999, should be, and the same is hereby, modified.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Kenneth Hanson, and against the respondent, U.S.D. No. 326, and its insurance carrier, EMC Insurance Company, for an accidental injury which occurred May 19, 1995, and based upon an average weekly wage of \$780.21, for 3.33 weeks of temporary total disability compensation at the rate of \$319 per week or \$1,062.27, followed by 80.63 weeks at the rate of \$319 per week or \$25,720.97 for a 41% impairment to the lower extremity, making a total award of \$26,783.24, all of which is presently due and owing less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 2000.

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BOARD MEMBER

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**DISSENT**

I disagree with the majority's award because it includes the amount of claimant's preexisting functional impairment. K.S.A. 44-501(c) provides, inter alia, that:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The record shows that claimant suffered from a preexisting degenerative process and had three prior surgeries to his right knee. That claimant had some preexisting functional impairment is clear. What is not clear is how much of claimant's current functional impairment is new, that is to say how much is a result of his May 19, 1995 accident, and how much preexisted. I agree with the majority that the record fails to establish the percentage of preexisting impairment to the right knee. But claimant bears the burden of proving the nature and extent of his disability. This burden includes proving how much of his present impairment is from the work-related accident.

K.S.A. 44-501(a) clearly places the burden of proof on the claimant to prove all of the various conditions upon which his entitlement to compensation depends. The majority shifts this burden to respondent by requiring respondent to prove the percentage of claimant's preexisting functional impairment.

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BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS  
James M. McVay, Great Bend, KS  
Bruce E. Moore, Administrative Law Judge

**KENNETH HANSON**

**6**

**DOCKET NO. 217,114**

Philip S. Harness, Director